U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

DATE: JAN 15 2014 Office: NEBRASKA SERVICE CENTER [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as an Alien of Extraordinary Ability Pursuant to Section 203(b)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(A)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks classification as an "alien of extraordinary ability" in the sciences, pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(A). The director found that the petitioner had not established himself as "an individual of extraordinary ability."

Congress set a very high benchmark for aliens of extraordinary ability by requiring through the statute that the petitioner demonstrate the alien's "sustained national or international acclaim" and present "extensive documentation" of the alien's achievements. *See* section 203(b)(1)(A)(i) of the Act and 8 C.F.R. § 204.5(h)(3). The implementing regulation at 8 C.F.R. § 204.5(h)(3) states that an alien can establish sustained national or international acclaim through evidence of a one-time achievement of a major, internationally recognized award. Absent the receipt of such an award, the regulation outlines ten categories of specific objective evidence. 8 C.F.R. § 204.5(h)(3)(i) through (x). The petitioner must submit qualifying evidence under at least three of the ten regulatory categories of evidence to establish the basic eligibility requirements.

On appeal, counsel submits a brief, which generally repeats the same assertions made in response to the director's request for evidence (RFE), and additional evidence. For the reasons discussed below, upon review of the entire record, the petitioner has not established his eligibility for the exclusive classification sought.

I. LAW

Section 203(b) of the Act states, in pertinent part, that:

> (1) Priority workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):
>
> > (A) Aliens with extraordinary ability. -- An alien is described in this subparagraph if --
> >
> > > (i) the alien has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation,
> > >
> > > (ii) the alien seeks to enter the United States to continue work in the area of extraordinary ability, and
> > >
> > > (iii) the alien's entry into the United States will substantially benefit prospectively the United States.

U.S. Citizenship and Immigration Services (USCIS) and legacy Immigration and Naturalization Service (INS) have consistently recognized that Congress intended to set a very high standard for individuals seeking immigrant visas as aliens of extraordinary ability. *See* H.R. 723 101st Cong., 2d Sess. 59 (1990); 56 Fed. Reg. 60897, 60898-99 (Nov. 29, 1991). The term "extraordinary ability" refers only to those individuals in that small percentage who have risen to the very top of the field of endeavor. *Id.*; 8 C.F.R. § 204.5(h)(2).

The regulation at 8 C.F.R. § 204.5(h)(3) requires that the petitioner demonstrate the alien's sustained acclaim and the recognition of his achievements in the field. Such acclaim must be established either through evidence of a one-time achievement (that is, a major, international recognized award) or through the submission of qualifying evidence under at least three of the ten categories of evidence listed at 8 C.F.R. § 204.5(h)(3)(i)-(x).

In 2010, the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) reviewed the denial of a petition filed under this classification. *Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010). Although the court upheld the AAO's decision to deny the petition, the court took issue with the AAO's evaluation of evidence submitted to meet a given evidentiary criterion.[1] With respect to the criteria at 8 C.F.R. § 204.5(h)(3)(iv) and (vi), the court concluded that while USCIS may have raised legitimate concerns about the significance of the evidence submitted to meet those two criteria, those concerns should have been raised in a subsequent "final merits determination." *Id.* at 1121-22.

The court stated that the AAO's evaluation rested on an improper understanding of the regulations. Instead of parsing the significance of evidence as part of the initial inquiry, the court stated that "the proper procedure is to count the types of evidence provided (which the AAO did)," and if the petitioner failed to submit sufficient evidence, "the proper conclusion is that the applicant has failed to satisfy the regulatory requirement of three types of evidence (as the AAO concluded)." *Id.* at 1122 (citing to 8 C.F.R. § 204.5(h)(3)).

Thus, *Kazarian* sets forth a two-part approach where the evidence is first counted and then considered in the context of a final merits determination. In this matter, the AAO will review the evidence under the plain language requirements of each criterion claimed. As the petitioner did not submit qualifying evidence under at least three criteria, the proper conclusion is that the petitioner has failed to satisfy the antecedent regulatory requirement of three types of evidence. *Id.*

II. ANALYSIS

A. Standard of Proof

Counsel's brief on appeal and in response to the director's RFE indicates that, instead of applying the preponderance of the evidence standard of proof, the director applied a higher evidence standard by "seeking to 'eliminate all doubt.'" The record does not support counsel's assertion that the director

[1] Specifically, the court stated that the AAO had unilaterally imposed novel substantive or evidentiary requirements beyond those set forth in the regulations at 8 C.F.R. § 204.5(h)(3)(iv) and 8 C.F.R. § 204.5(h)(3)(vi).

held the petitioner's evidence to an elevated standard beyond that which is required by most administrative immigration cases; the preponderance of the evidence standard of proof. The most recent precedent decision related to the preponderance of the evidence standard of proof is *Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010). This decision, and this standard, focuses on the factual nature of a claim; not whether a claim satisfies a regulatory requirement. *Id.* at 376. The preponderance of the evidence standard does not preclude USCIS from evaluating the evidence. The *Chawathe* decision also stated:

> [T]he "preponderance of the evidence" standard does not relieve the petitioner or applicant from satisfying the basic evidentiary requirements set by regulation...Had the regulations required specific evidence, the applicant would have been required to submit that evidence. *Cf.* 8 C.F.R. § 204.5(h)(3) (2006) (requiring that specific objective evidence be submitted to demonstrate eligibility as an alien of extraordinary ability). 25 I&N Dec. at 375 n.7.

The final determination of whether the evidence meets the plain language requirements of a regulation lies with USCIS. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r 1988) (finding that the appropriate entity to determine eligibility is USCIS in a scenario whereby an advisory opinion or statement is not consistent with other information that is part of the record). Ultimately, USCIS determines the truth not by the quantity of evidence alone but by its quality. *Matter of Chawathe,* 25 I&N Dec. at 376 citing *Matter of E-M-* 20 I&N Dec. 77, 80 (Comm'r 1989). Finally, the *Chawathe* decision states:

> Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "more likely than not" or "probably" true, the applicant or petitioner has satisfied the standard of proof. *See INS v. Cardoza-Fonseca,* 480 U.S. 421, 431 (1987) (discussing "more likely than not" as a greater than 50% chance of an occurrence taking place). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition. *Id.*

As the director concluded that the petitioner had not submitted relevant and probative evidence satisfying the regulatory requirements, the director did not violate the appropriate standard of proof.

B. Evidentiary Criteria

Evidence of the alien's participation, either individually or on a panel, as a judge of the work of others in the same or an allied field of specification for which classification is sought.

The director found that the petitioner established that he satisfies the plain language requirements of the regulation at § 204.5(h)(3)(iv) and the record supports the director's finding.

Evidence of the alien's original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field.

On appeal, counsel asserts that the petitioner's original contributions are evidenced by his "publications in top international journals, the extensive attention they received by the international scholarly community[,]...invitations to present at conferences and nine (9) advisory letters." While the petitioner has co-authored several articles and presented at a number of conferences, the regulations contain a separate criterion regarding the authorship of scholarly articles. 8 C.F.R. § 204.5(h)(3)(vi). If the regulations are to be interpreted with any logic, it must be presumed that the regulation views contributions as a separate evidentiary requirement from scholarly articles.[2] Furthermore, the simple fact that the beneficiary's findings have been published and presented at conferences does not create a presumption that the findings, upon dissemination in the field, impacted the field, or are otherwise original contributions of major significance.

The record contains a number of letters of recommendation. In general, the letters praise the petitioner's research findings. The petitioner's field, like most science, is research-driven, and scientists are unlikely to publish research that does not add to the general pool of knowledge in the field. According to the regulation at 8 C.F.R. § 204.5(h)(3)(v), an alien's contributions must be not only original but of major significance. The phrase "major significance" is not superfluous and, thus, it has some meaning. *Silverman v. Eastrich Multiple Investor Fund, L.P.*, 51 F. 3d 28, 31 (3rd Cir. 1995) *quoted in APWU v. Potter*, 343 F.3d 619, 626 (2nd Cir. 2003). To be considered a contribution of major significance in the field of science, it can be generally expected that other experts would have reproduced or otherwise applied the petitioner's results. Otherwise, the impact of the work is difficult to gauge.

Regarding the petitioner's work on robotic surgical tools, , Assistant , states that, based upon a review of the beneficiary's "professional credentials, bibliography, and record of achievements," that the beneficiary's participation as part of "the team at the in building "a compact robot...will usher in new technology and further the development of robotic laparoscope assistants." , states that the research performed by the team at "will change the future of surgery by minimizing or eliminating human error and imprecision" and that "it increased the potential to develop new therapeutic interventions for surgery in the battlefield." Neither these letters, nor any of the other letters which discuss this work, explain how being a member of a team that developed original techniques demonstrates the actual present impact of the petitioner's work. Instead, the petitioner's references speculate about how the work of the team may affect the field at some point in the future. Eligibility must be established at the time of filing. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of*

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[2] Publication and presentations are not sufficient evidence under 8 C.F.R. § 204.5(h)(3)(v) absent evidence that they were of "*major* significance." *Kazarian v. USCIS,* 580 F.3d 1030, 1036 (9th Cir. 2009) *aff'd in part* 596 F.3d 1115 (9th Cir. 2010). In 2010, the *Kazarian* court reaffirmed its holding that the AAO did not abuse its discretion in finding that the alien had not demonstrated contributions of major significance. 596 F.3d at 1122.

Katigbak, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). A petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Izummi,* 22 I&N Dec. 169, 175 (Comm'r 1998). That decision further provides, citing *Matter of Bardouille,* 18 I&N Dec. 114 (BIA 1981), that USCIS cannot "consider facts that come into being only subsequent to the filing of a petition." *Id.* at 176. The assertion that the research results are likely to be influential is not adequate to establish that his findings are already recognized as major contributions in the field.

Regarding the petitioner's hernia research, , states that that the petitioner "conducts advanced research for many complex hernia reconstruction and laparoscopy outcomes which has initiated a significant change in [the] practice of surgeons in [the] future and decrease[s] healthcare costs across the entire world." However, fails to provide any evidence or list any examples to support a claim that changes in the practice of hernia reconstruction had already taken place beyond the petitioner's employer. Dr. Antonello Forgione, Scientific Director of the Advanced International Mini-Invasive Surgery Academy, states that the petitioner's research "showed that light weight mesh should be used while performing a laparoscopic inguinal hernia since it leads to better long term outcomes and reduced discomfort many years after hernia surgery." However, neither these letters, nor any of the others, state that surgeons have changed their practice as a result of the petitioner's research.

While the letters praise the petitioner and his work, the record lacks corroborating evidence, such as letters from independent surgeons who have changed their practice based upon the petitioner's findings or are using the petitioner's research as a basis for their own. Vague, solicited letters that repeat the regulatory language but do not explain how the petitioner's contributions have already influenced the field is insufficient to establish original contributions of major significance in the field. *Kazarian v. USCIS*, 580 F.3d 1030, 1036 (9th Cir. 2009) *aff'd in part* 596 F.3d 1115 (9th Cir. 2010). In 2010, the *Kazarian* court reiterated that the USCIS' conclusion that the "letters from physics professors attesting to [the petitioner's] contributions in the field" were insufficient was "consistent with the relevant regulatory language." 596 F.3d at 1122. Moreover, the letters fail to provide specific examples of how the petitioner's contributions rise to a level consistent with major significance in the field. Repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

Regarding citations, while the number of total citations is a factor, it is not the only factor to be considered in determining the petitioner's eligibility for this criterion. Generally, the number of citations is reflective of the petitioner's original findings and that the field has taken some interest in the petitioner's work. However, it is not an automatic indicator that the petitioner's work has been of major significance in the field, especially when the number of citations is not significant. In this case, the petitioner's small number of citations per article is not reflective of work that has been of major significance in the field. While evidence other than citations could establish the significance of the petitioner's published research, the petitioner did not submit any other documentary evidence demonstrating that his articles have been unusually influential, such as, for example, articles that discuss in-depth the petitioner's findings or credit the petitioner with influencing or impacting the

field. Here, the petitioner's documentary evidence is not reflective of having a significant impact on the field.

In light of the above, the petitioner has not established that he meets the plain language requirements of the regulation.

Evidence of the alien's authorship of scholarly articles in the field, in professional or major trade publications or other major media.

The director found that the petitioner established that he satisfies the plain language requirements of the regulation at § 204.5(h)(3)(vi) and the record supports the director's finding.

Evidence of the display of the alien's work in the field at artistic exhibitions or showcases.

The petitioner submitted documentation showing that he presented his work at various scientific conferences and meetings as evidence for this regulatory criterion. The petitioner's field, however, is in the sciences rather than the arts. The interpretation that 8 C.F.R. § 204.5(h)(3)(vii) is limited to the visual arts is longstanding and has been upheld by a federal district court. *Negro-Plumpe v. Okin,* 2:07-CV-820-ECR-RJJ at *1, *7 (D. Nev. Sept. 8, 2008) (upholding an interpretation that performances by a performing artist do not fall under 8 C.F.R. § 204.5(h)(3)(vii)). As the petitioner is not a visual artist and has not created tangible pieces of art that were on display at exhibitions or showcases, he has not submitted qualifying evidence that meets the plain language requirements of the regulation at 8 C.F.R. § 204.5(h)(3)(vii). The ten criteria in the regulations are designed to cover different areas; not every criterion will apply to every occupation. Moreover, it is neither arbitrary, capricious, nor an abuse of discretion to conclude that presentations at scientific conferences do not qualify as display of the petitioner's work at artistic exhibitions or showcases pursuant to 8 C.F.R. § 204.5(h)(3)(vii). *Kazarian,* 596 F. 3d at 1122.

While the regulation at 8 C.F.R. § 204.5(h)(4) provides "[i]f the above standards do not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence to establish the beneficiary's eligibility," it is clear from the use of the word "shall" in 8 C.F.R. § 204.5(h)(3) that the rule, not the exception, is that the petitioner must submit evidence to meet at least three of the regulatory criteria. Thus, it is the petitioner's burden to explain why the regulatory criteria are not readily applicable to his occupation and how the evidence submitted is "comparable" to the objective evidence required at 8 C.F.R. § 204.5(h)(3)(i)-(x).

The regulatory language precludes the consideration of comparable evidence in this case, as there is no indication that the standards at 8 C.F.R. § 204.5(h)(3) do not readily apply to the petitioner's occupation. In fact, as indicated in this decision, counsel asserts that the petitioner satisfies four of the ten criteria at the regulation at 8 C.F.R. § 204.5(h)(3). An inability to meet a criterion, however, is not necessarily evidence that the criterion does not apply to the petitioner's occupation. Where an alien is simply unable to meet or submit documentary evidence of three of these criteria, the plain language of the regulation at 8 C.F.R. § 204.5(h)(4) does not allow for the submission of comparable evidence.

As the petitioner is not a visual artist and has not created tangible pieces of art that were on display at exhibitions or showcases, the petitioner has not submitted qualifying evidence that meets the plain language requirements of the regulation at 8 C.F.R. § 204.5(h)(3)(vii).

> *Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation.*

In the case of a leading role, the petitioner must demonstrate how the role fits within the overall hierarchy of the organization or establishment. In the case of a critical role, the petitioner must have contributed to the success of the establishment or organization beyond merely providing necessary services.

The record contains two letters, one from the Program Director and Associate Professor in the Department of which praise the petitioner's research contributions. However, these letters fail to demonstrate how the petitioner performed in a critical or leading role for the establishment beyond need for competent and creative researchers.

The record does not contain persuasive evidence that being a member of the Minimally Invasive Surgery team, even for an organization with a distinguished reputation, is performing in a leading role. For example, the record does not establish the total number of researchers at , nor provide an organizational chart or other evidence of its hierarchy. When compared to the authors of the letters, the petitioner's role as a researcher does not reflect that he performed in a leading role. Institutions such as routinely rely on individuals like the petitioner to further their research.

The documentation submitted also does not establish that the petitioner was responsible for success or standing to a degree consistent with the meaning of a "critical role." As stated by the director in his decision, "the research projects conducted by the petitioner and his colleagues are a small sample of the nearly 400 such projects underway at While the petitioner has played an important role in individual projects at the evidence does not establish that his role was leading or critical to as a whole."

Furthermore, the plain language of the regulation requires the petitioner to have performed in a leading or critical role for more than one organization or establishment. Significantly, not all of the criteria at 8 C.F.R. § 204.5(h)(3) are worded in the plural. Specifically, the regulations at 8 C.F.R. §§ 204.5(h)(3)(iv) and (ix) only require service on a single judging panel or a single high salary. When a regulatory criterion wishes to include the singular within the plural, it expressly does so as when it states at 8 C.F.R. § 204.5(k)(3)(ii)(B) that evidence of experience must be in the form of "letter(s)." Thus, the AAO can infer that the plural in the remaining regulatory criteria has meaning. In a different context, federal courts have upheld USCIS' ability to interpret significance from whether the singular or plural is used in a regulation. *See Maramjaya v. USCIS*, Civ. Act. No. 06-2158 (RCL) at 12 (D.C. Cir. March 26, 2008); *Snapnames.com Inc. v. Chertoff*, 2006 WL 3491005 at *10 (D. Or. Nov. 30, 2006) (upholding an interpretation that the regulatory requirement for "a" bachelor's degree or "a"

foreign equivalent degree at 8 C.F.R. § 204.5(l)(2) requires a single degree rather than a combination of academic credentials). Therefore, even if the record established that the petitioner held a leading or critical role at and it does not, there is nothing in the regulations to allow for the waiver of the plural requirement.

In light of the above, the petitioner has not established that he meets the plain language requirements of this regulatory criterion.

C. Intent to Continue to Work in Area of Expertise

The regulation at 8 C.F.R. § 204.5(h)(5) states:

> Neither an offer for employment in the United States nor a labor certification is required for this classification; however, the petition must be accompanied by clear evidence that the alien is coming to the United States to continue work in the area of expertise. Such evidence may include letter(s) from prospective employer(s), evidence of prearranged commitments such as contracts, or a statement from the beneficiary detailing plans on how he or she intends to continue his or her work in the United States.

The director's RFE stated that '[t]he petitioner intends to work as a surgeon in the field of medicine." Counsel, however, repeatedly states on appeal and in response to the director's RFE, "the [p]etitioner's actual field of endeavor is **clinical surgery research** (as opposed to surgery or medicine)." The Form I-140, Immigrant Petition for Alien Worker, signed under penalty of perjury, lists the petitioner's occupation as research scientist. In response to the RFE and on appeal, counsel states that "if [the] [p]etitioner's field was surgery or medicine, his accomplishments would need to be evaluated based on the number of surgeries he has completed, the surgical techniques he was able to perform and the contributions he has made as a clinician." Counsel further states that "he is already an accomplished surgery researcher, and he is seeking to qualify for an immigrant visa in this capacity." Counsel also requests that the director "take note of this important distinction, as evaluating [the] [p]etitioner's accomplishments within an incorrect field would bring the [director] to an invalid conclusion."

In *Lee v. Ziglar*, 237 F. Supp. 2d 914 (N.D. Ill. 2002), the court stated:

> It is reasonable to interpret continuing to work in one's "area of extraordinary ability" as working in the same profession in which one has extraordinary ability, not necessarily in any profession in that field. For example, Lee's extraordinary ability as a baseball player does not imply that he also has extraordinary ability in all positions or professions in the baseball industry such as a manager, umpire or coach.

Id. at 918. The court noted a consistent history in this area.

A review of the record of proceeding reflects that the petitioner did not submit any documentary evidence demonstrating that he intends to continue work in his area of expertise, clinical surgery

research. As stated by counsel, the petitioner "is currently a surgery resident at the [3] The petitioner did not submit, for example, any prospective job letters, contracts or other evidence (including a detailed personal statement) detailing how he would obtain employment in the field of clinical surgery research. The petitioner's filing of an employment-based petition is insufficient to demonstrate a detailed plan of his intention to continue to work in his area of expertise.

Thus, beyond the decision of the director, the petitioner has not established that he intends to come to the United States to continue working in clinical research surgery, his area of expertise, pursuant to section 203(b)(1)(A)(ii) of the Act and the regulation at 8 C.F.R. § 204.5(h)(5).

D. Summary

As the petitioner did not submit qualifying evidence under at least three criteria, the proper conclusion is that the petitioner has failed to demonstrate that he satisfies the antecedent regulatory requirement of three types of evidence.

III. CONCLUSION

Had the petitioner submitted the requisite evidence under at least three evidentiary categories, in accordance with the *Kazarian* opinion, the next step would be a final merits determination that considers all of the evidence in the context of whether or not the petitioner has demonstrated: (1) a "level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the[ir] field of endeavor" and (2) "that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise." 8 C.F.R. §§ 204.5(h)(2) and (3); *see also Kazarian,* 596 F.3d at 1119-20. While the AAO concludes that the evidence is not indicative of a level of expertise consistent with the small percentage at the very top of the field or sustained national or international acclaim, the AAO need not explain that conclusion in a final merits determination.[4] Rather, the proper conclusion is that the petitioner failed to demonstrate that he has satisfied the antecedent regulatory requirement of three types of evidence. *Id.* at 1122.

The petitioner has not established eligibility pursuant to section 203(b)(1)(A) of the Act and the petition may not be approved.

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[3] The petitioner is currently the beneficiary of an approved nonimmigrant visa petition the University Health filed on July 1, 2013, listing the position title as "Fellow – Surgical Oncology." In the cover letter to the petition, the employer stated that the petitioner in this matter would "examine, diagnose, develop and carry out patient management plans, and provide health care services aimed at preventing health problems or maintaining health."

[4] The AAO maintains de novo review of all questions of fact and law. *See Soltane v. DOJ*, 381 F.3d at 145. In any future proceeding, the AAO maintains the jurisdiction to conduct a final merits determination as the office that made the last decision in this matter. 8 C.F.R. § 103.5(a)(1)(ii). *See also* section 103(a)(1) of the Act; section 204(b) of the Act; DHS Delegation Number 0150.1 (effective March 1, 2003); 8 C.F.R. § 2.1 (2003); 8 C.F.R. § 103.1(f)(3)(iii) (2003); *Matter of Aurelio*, 19 I&N Dec. 458, 460 (BIA 1987) (holding that legacy INS, now USCIS, is the sole authority with the jurisdiction to decide visa petitions).

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.